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In The

Supreme Court of the United States

IOWA CONFERENCE OF THE UNITED METHODIST CHURCH, THE UNITED METHODIST CHURCH OF SHELL ROCK, IOWA, JERROLD W. SWINTON, RICK KROMMINGA, KAREN WAHL, KAY J. LAHR, and KAREN PETERSON,

Petitioners,

v.

JANE KLIEBENSTEIN and GLEN KLIEBENSTEIN,

Respondents.

On Petition For A Writ Of Certiorari To The Iowa Supreme Court

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF FOR *AMICUS CURIAE* SOUTHERN BAPTIST CONVENTION SUPPORTING PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37.2(a) and (b) of the Rules of the Supreme Court of the United States, the Southern Baptist Convention respectfully requests leave to file the accompanying *amicus curiae* brief, which is submitted in support of petition for a writ of certiorari to the Iowa Supreme Court.

Petitioners Iowa Conference of the United Methodist Church, The United Methodist Church of Shell Rock, Iowa, Jerrold W. Swinton, Rick Krommings, Karen Wahl, Kay J. Lahr, and Karen Peterson have consented to the filing of this brief. Respondents Jane Kliebenstein and Glen Kliebenstein have not consented.

As set forth in the brief below, since its organization in 1845 in Augusta, Georgia, the Southern Baptist Convention has grown to over 16 million members who worship in more than 42,000 churches in the United States. Southern Baptists sponsor approximately 5,000 home missionaries serving the United States, Canada, Guam and the Caribbean, as well as more than 5,000 foreign missionaries in 153 nations of the world. The term "Southern Baptist Convention" refers to both the denomination and its annual meeting.

The Southern Baptist Convention cherishes and defends religious liberty, and denies the right of any secular or religious authority to impose a confession of faith upon a church or body of churches. As a member of a society founded upon the exercise of religion free from civil interference, the Southern Baptist Convention urges review of the recent decision of the Iowa Supreme Court in *Kliebenstein v. Iowa Conference of the United Methodist*

Church. The holding in *Kliebenstein* threatens to curb religious liberties and promote civil redress for private injury above judicial abstention from ecclesiastic affairs. Continued intrusion by civil authorities into the truth, falsity, or propriety of religious doctrine and belief threatens to erode the religious freedoms fundamental to the Constitution of these United States.

Respectfully submitted,

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SUMMARY OF ARGUMENT[1]

Illustration: A salesman embarks on a business trip across the United States. Beginning in New York, he devises to travel south to Alabama and the surrounding states; turn north to Iowa and the Midwest; proceed west to Oregon and the Pacific Coast; and end in California.

In each state along his journey, the businessman – a devout follower of the American Bible Church – stops to worship at a local parish of that denomination. Signs posted proudly on the church doors proclaim "Non-Members Welcome."

The parishioners prove welcoming indeed, and the clergy's homilies inspirational. Yet remarkably, each and every sermon concludes with the local pastor's pointed admonition:

"Be vigilant, for the Serpent is among you, seeking to devour you."

The salesman grows increasingly unnerved by the apparent coincidence. By the time his trip ends in California, he is convinced that the pastors' bidding was directed at him. Irate, the businessman retains counsel to determine whether he has a valid claim against the Church and its pastors.

His lawyer, after exhaustive research, reports a mixed conclusion.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members or its counsel made a monetary contribution to the preparation and submission of this brief.

"The good news," she advises, "is that you may sue for defamation in at least seven states." She pauses.

"Unfortunately, it appears in the remaining states that you may very well be the Antichrist."

* * *

The outcome of the hypothetical sales trip is not inconceivable given the discordant application of federal constitutional law by state courts throughout the nation. When debating whether to exercise jurisdiction over private claims for defamation against a church or its officials, state courts have applied varying criteria, considered *ad hoc* combinations of constitutional principles, and reached vastly disparate conclusions.

No matter whether the courts' threshold inquiry is couched in terms of "subject matter jurisdiction" or "privilege," the Free Exercise Clause or the Establishment Clause, their holdings are predictably irreconcilable. The result is an amalgam of case law so lacking in consistency that "one of Satan's choicest tools" may sue for defamation in California, but an Ohio court is without jurisdiction to hear the claims of a parishioner who is "in league with Satan."

At the heart of the dilemma is the infiltration of church doctrine inherent in judicial review of ecclesiastic expression. While this Court has long acknowledged the constitutional bar on civil determination of religious doctrine, many lower courts have abrogated that restriction by examining clerical speech in a falsely "secular" light. The recent decision of the Iowa Supreme Court in *Kliebenstein v. Iowa Conference of the United Methodist Church* underscores the instant need for this Court's guidance in restraining judicial review of religious speech.

Kliebenstein holds that a biblical exhortation in a church mailing is actionable under private defamation law because its reference to the "spirit of Satan" is susceptible to secular interpretation. May a civil court infringe on church autonomy if *any* secular meaning can be ascribed to religious expression?

First Amendment prohibitions on civil inquiry into church doctrine mandate the answer "no." The innate religious content of the communication in *Kliebenstein*, complete with biblical reference, deprives a civil court of jurisdiction under constitutional principles of church autonomy. To adjudicate this case would require a court to wade impermissibly into religious doctrine and usage codifying the standards and morals required of a member of the United Methodist Church.

Through six degrees of interpretation, however, the Iowa Supreme Court sidestepped a collision of church and state. Instead of concluding that the ecclesiastic speech is immune from judicial scrutiny, the court assigned itself the peculiar task of determining whether the phrase "spirit of Satan" is susceptible to a secular translation. Eschewing the Bible for the dictionary, the court equated "Satan" with "Devil"; "Devil" with "fiend"; "satanic" with "cruelty"; and "spirit" with "mood." Thus, the Iowa Supreme Court held that the biblical reference to the "spirit of Satan" subjects the church to a private defamation action because a jury might consider the phrase without undergoing "theological reflection."

The unworkable standard elicited in *Kliebenstein* renders the church-autonomy doctrine a legal fiction. One struggles to conceive of a sectarian phrase that is not capable of secular meaning. With the appropriate dictionaries at

hand, even "Christ" is "the Messiah"; the "Messiah" a "messiah"; and a "messiah" a "guardian angel." Thus, under *Kliebenstein*, a pastor who rebukes the unfaithful for "denouncing Christ" is subject to a lawsuit for defaming those who admonish angels. The linguistic exercise – while a lexicographer's dream – is one in futility.

When properly applied, First Amendment principles require the reverse standard: that civil courts lack jurisdiction over defamation claims demanding review of the truth or falsity of religious expression. The question of jurisdiction must turn on whether the offending speech is rooted in religion when *published*, and not whether it is capable of any secular meaning after semantic remodeling.

Moreover, it is irrelevant whether a religious publication reaches the eyes or ears of "non-members" of a church. If an expression is divested of constitutional protection the moment it escapes the confines of the church, then virtually no religious statement is immune from scrutiny. A declaration in a religious text pronouncing nonbelievers "sinners" will support a defamation claim if non-members can purchase the text in a religious bookstore. A pastor's sermon, likewise, will be grounds for civil action if the church permits non-members to attend worship services. Judicial review of theology will supplant church autonomy.

This Court should grant the petition for a writ of certiorari and clarify the First Amendment protection afforded religious speech in the context of tort action for defamation. Without an articulated standard for abstention, civil encroachment on church autonomy threatens to erode the fundamental freedom of religious expression.

ARGUMENT

1. The Court has never considered church autonomy and First Amendment principles in the context of defamation.

While the Court has applied First Amendment jurisprudence to restrict judicial intervention in church property disputes, *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-11 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969), tort claims for defamation in matters of religious discourse or discipline implicate similar but additional constitutional concerns that the Court has never addressed. *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 714 N.E.2d 253, 261-62 (Ind. Ct. App. 1999) (noting that the "neutral principles of law" approach enunciated in *Presbyterian Church*, *supra*, and *Jones v. Wolf*, *supra*, has been applied "only to disputes involving church property").

The misguided standard applied in *Kliebenstein*, and in opinions reaching the same conclusion, merits this Court's review. The issues of civil abstention and church autonomy, privilege and publication, and secular inquiry into the truth or falsity of religious doctrine and beliefs are all raised by the Iowa Supreme Court's ruling in *Kliebenstein*.

2. State courts considering constitutional principles of religious freedom are split in deciding whether and when to exercise jurisdiction in "religious defamation" actions.

State courts are split on the issue of exercising jurisdiction over defamation actions against a church. Those courts declining to exercise jurisdiction properly decide at

the threshold whether religious doctrine is implicated by the offending speech and, if so, go no further. Courts employing the reasoning of *Kliebenstein*, however, extend jurisdiction whenever secular connotation may be imputed to religious expression.

The right to practice religion free from governmental interference is a rudiment of constitutional law. Principles of religious freedom codified by the First Amendment have "secured religious liberty from the invasion of civil authority." *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 15 (1947) (citing *Watson v. Jones*, 80 U.S. 697, 730 (1871)). When balancing freedom of religion with competing interests, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

Civil adjudication of a defamation claim brought against a church or its officers for religious speech implicates that balance of conflicting interests. Defamation, a creature of common law, protects against personal injury to reputation and is no stranger to combat with First Amendment principles of free speech. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11-22 (1990) (discussing development of defamation law and balancing against constitutional guarantees of freedom of speech); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334-48 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 272-73 (1964). The adjudication of private defamation actions and the constitutional hurdles imposed by the freedoms of speech and press – including elements of fact or opinion, truth or falsity, innocence or malice – has proper audience in judge and jury.

The issue presented in *Kliebenstein*, however, pits civil redress for private injury against civil abstention from matters of religion. Whereas judicial scrutiny may protect free speech in the course of a defamation suit, *Milkovich*, *supra*, at 21, the freedom *from* judicial scrutiny is the very privilege afforded religious expression. *Watson*, *supra*, at 728, 730; *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 369-70 (1970) (civil determination of religious doctrine violates First Amendment). It follows that a civil court's narrow focus in a defamation action against a church is whether the offending speech is of a religious nature or concern. When church doctrine or discipline is implicated, the First Amendment divests the court of jurisdiction over the dispute.

A. Courts declining to exercise jurisdiction properly focus on whether the offending speech originates within the "realm of religion."

The logic of judicial abstention from tort actions for defamation against a church is presented best by the Supreme Court of Hawaii in *O'Connor v. Diocese of Honolulu*, 885 P.2d 361 (Haw. 1994). In a defamation action against the Roman Catholic Church by a member for allegedly false statements leading to his excommunication, the court acknowledged that the "ecclesiastical abstention" doctrine inherent in the First Amendment applies to the states through the Fourteenth Amendment, *id.* at 364, and that First Amendment protection of religious freedom prohibits a civil court's "extensive inquiry . . . into religious law and polity." *Id.* at 367. The court next considered whether the exercise of jurisdiction over O'Connor's claims would constitute secular adjudication of "underlying controversies over

religious doctrine." *Id.* (citing *Milivojevich*, *supra*, at 709-10).

The Supreme Court of Hawaii first addressed the offending speech, which regarded O'Connor's excommunication and included statements regarding his "wickedness," disloyalty to the Pope, and propensity for "schism." *Id.* at 367-68. When considered in the context of a private claim for defamation, the court concluded that the statements were not amenable to judicial review:

> . . . It is apparent that, to determine the truth or falsity of the statements, a state court would have to inquire into church teachings and doctrine. The comments attributed to the [church defendants] and alleged to be defamatory *are phrased in terms of religious doctrine or church governance*. The question whether the statements attributed to the [church defendants] correctly reflect the church's views *can be answered only by determining doctrinal correctness or by analyzing church law*; these are determinations that cannot be made by civil courts. Because the law knows no heresy and is committed to the support of no dogma or the establishment of any sect, *Milivojevich*, 426 U.S. at 710-711, . . . the secular law cannot determine [O'Connor's claims]. ***These are all matters that are patently and obviously within the realm of religious doctrine and polity; adjudication of them is clearly beyond the purview of civil courts.***

Id. at 368 (emphasis added). Thus, the court held that civil adjudication of the defamation action was prohibited by the Constitution. *Id.* at 367.

The Hawaii court's reasoning soundly applies First Amendment protection to speech that originates "within

the realm" of religious doctrine and discipline. Notably, the publication of the religious speech in *O'Connor* in a Catholic newspaper was irrelevant to the court's determination, whether the publication extended beyond the confines of the Roman Catholic Church or not. *Id.* and n.11 (publication of alleged defamatory statements in *The Wanderer* newspaper had no bearing on the court's decision).

Most important, *O'Connor* demonstrates the inherent impossibility of secular determination of the "truth or falsity" of religious statements, an essential element to any defamation action. *See Milkovich v. Lorain Journal Co.*, 497 U.S. at 11 (quoting RESTATEMENT (SECOND) OF TORTS § 566, cmt. a (1977)) ("truth is a complete defense to a suit for defamation"); *see also* 50 AM. JUR.2d Libel and Slander § 27 (2003) ("To be defamatory, a statement must be false."). The "truth or falsity" inquiry germane to a defamation action necessitates, in cases involving religious speech, civil adjudication of the truth of religious doctrine and belief. This Court has long prohibited civil inquest into "*all questions* concerning the truth or falsity of the religious beliefs or doctrines" of a litigant. *U.S. v. Ballard*, 322 U.S. 78, 87 (1944) (civil courts undertaking to adjudicate truth or falsity of religious belief enter "forbidden domain") (emphasis added).

Cases in line with *O'Connor* espouse the same principles of church autonomy, though they often vary in their reliance on specific constitutional provisions and lines of jurisprudence. *See, e.g., Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808, 811-14 (Md. Ct. Spec. App. 1996); *Hadnot v. Shaw*, 826 P.2d 978, 987 (Okla. 1992) ("The First Amendment will protect and shield the religious body from liability for the activities carried on pursuant to the exercise of church discipline.

Within the context of ecclesiastical discipline, churches enjoy an absolute privilege from scrutiny by the secular authority."); *Schoenhals v. Mains*, 504 N.W.2d 233, 235-36 (Minn. Ct. App. 1993) (examination of the truth of religious statements would require an "impermissible inquiry into Church doctrine and discipline") (citing Establishment Clause); *Rasmussen v. Bennett*, 741 P.2d 755, 758-59 (Mont. 1987) (citing Free Exercise Clause); *Brazauskas*, *supra*, 714 N.E.2d at 261-62 (citing First Amendment jurisprudence but considering "neutral principles of law" approach in context of tort actions).

These authorities correctly support judicial abstention from religious matters in the ambit of defamation. *See also* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1 (1998); Carl H. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. Va. L. Rev. 1, 16 (1986); Douglass Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981) (Free Exercise Clause as source of church autonomy).

B. Courts exercising jurisdiction improperly apply "neutral principles of law" to permit secular review of religious expression.

In stark contrast, several courts have held that speech, doctrine, or discipline in the "realm of religion" is not immune from judicial scrutiny by examining religious affairs through a secular lens. *See Berger v. Temple Beth-El of Great Neck*, 756 N.Y.S.2d 94, 96 (N.Y. App. Div. 2d Dep't 2003) (jurisdiction exercised in defamation action against church); *McAdoo v. Diaz*, 884 P.2d 1385 (Alaska 1994)

(jurisdiction exercised in defamation action against church official); *Marshall v. Munro*, 845 P.2d 424, 427-28 (Alaska 1993) (jurisdiction exercised in defamation action against church minister); *McNair v. Worldwide Church of God*, 242 Cal. Rptr. 823, 831-39 (Cal. Ct. App. 1987) (jurisdiction exercised in defamation action against church and church officials); *Murphy v. Harty*, 393 P.2d 206 (Ore. 1964) (jurisdiction exercised in defamation action between church officials); *see also Yates v. El Bethel Primitive Baptist Church*, 847 So.2d 331 (Ala. 2002) (jurisdiction exercised in dispute among church officials regarding election of officials); *Bear v. Reformed Mennonite Church*, 341 A.2d 105 (Pa. 1975) (jurisdiction exercised in action in equity against church for excommunication and "shunning"). Many of these cases appear the result of wayward extension of the "neutral principles of law" doctrine espoused by this Court in resolving church property disputes, while others mistakenly apply freedom of speech standards to civil disputes implicating the free exercise of religion.

In *Berger v. Temple Beth-El of Great Neck*, for instance, Berger sued a synagogue and its executive board for defamation after a statement about him was published to the entire congregation. 756 N.Y.S.2d at 95. The Supreme Court, Appellate Division, held this year that jurisdiction was proper over Berger's claim because "the instant defamation action can be settled by the application of *neutral principles of law*, and does not implicate matters of religious doctrine and practice." *Id.* at 96 (citing *Jones v. Wolf*, 443 U.S. 595 (1979)) (emphasis added).

Likewise, in *McAdoo v. Diaz*, the Alaska Supreme Court considered a former church volunteer's defamation claim against the pastor who dismissed her. 884 P.2d at

1390-91. The court held that jurisdiction over the defamation action was appropriate because the inherent "truth or privilege" inquiries – while requiring "some general inquiry into the duties of a pastor" – did not "touch the merits of any core religious questions." *Id.*; *see also Richelle v. Roman Catholic Archbishop*, 130 Cal. Rptr.2d 601, 615 (Cal. Ct. App. 2003) (religious organizations subject to jurisdiction "where liability can be adjudicated on the basis of *neutral principles* requiring no inquiry into the validity of a religious belief or practice") (citing *U.S. v. Ballard*, 322 U.S. 78 (1944)) (emphasis added).

The California Court of Appeal in *McNair v. Worldwide Church of God* took a unique approach when faced with the question "whether the free exercise clause of the First Amendment of the United States Constitution bars a defamation suit brought against a church and two of its ministers for statements made during the course of a theological controversy." 242 Cal. Rptr. at 825. After a full discussion of constitutional principles of religious freedom, the California court *exercised* jurisdiction over the defamation action despite acknowledging the protection of religious speech afforded by the Free Exercise Clause. *Id.* at 830-31.

Rather than dismissing the defamation claim – involving statements made between two clerics "*during the course of a theological controversy*" – for lack of jurisdiction, the court turned to principles of constitutional law concerning defamation and freedom of *speech*. *Id.* at 831-32 (emphasis added). With the professed intent to "balance the reputational interest of our citizenry against the interests protected by the First Amendment's free exercise of religion clause," the California court examined this

Court's decisions in *Gertz v. Robert Welch, Inc.* and *New York Times Co. v. Sullivan* addressing "actual malice" in defamation actions brought by public figures. *Id.* The court concluded:

> Our accommodation of the competing interests of our society – one protecting reputation, the other, the free exercise of religion – requires that we hold that in order for a plaintiff to recover damages for defamatory remarks made during the course of a doctrinal explanation by a duly authorized minister, he/she must show, by clear and convincing evidence, that the defamation was made with constitutional malice. . . .

Id. at 833. Thus, the California court ensured governmental entanglement in affairs of religion by creating a "heightened standard" for defamation actions between or against a church or its officials that provides artificial protection from civil inquiry into religious statements or belief. Judicial review of the "truth or falsity" of religious speech, forbidden ground for civil inquiry, is not subverted by heightening a plaintiff's burden of proof.

Whether by faulty reasoning or slipshod extension of inapplicable standards, the exercise of jurisdiction by civil courts in the "realm of religion" illustrates the need for this Court's intervention in the protection of religious freedom.

C. The Iowa Supreme Court's reasoning in *Kliebenstein* exacerbates civil infringement on church autonomy by translating religious speech so that it may *become* secular.

If the holdings of the cases discussed above threaten to erode religious liberty, the Iowa Supreme Court's decision in *Kliebenstein v. Iowa Conference of the United Methodist Church* stands to eradicate it. That the Iowa court exercised jurisdiction over a defamation claim brought against a church for religious communication in a disciplinary matter – complete with Bible reference – is wrong enough. 663 N.W.2d 404, 406-08.

More disturbing, the court went to such measures to square the exercise of jurisdiction with constitutional principles that it actually *translated* religious speech into secular speech to answer its "dispositive question," whether "the phrase 'spirit of Satan' has a secular meaning that could be applied in a civil suit for defamation without treading on – or wading into – religious doctrine," in the affirmative. *Id.* at 407.

It remains unclear how the Iowa Supreme Court managed to frame its "dispositive question on appeal." The proper question, in light of First Amendment principles and constitutional jurisprudence, is whether the phrase "spirit of Satan" implicates theological doctrine and belief that is immune from secular scrutiny for its "truth or falsity." *U.S. v. Ballard*, 322 U.S. at 87; *Watson v. Jones*, 80 U.S. at 730; *Md. & Va. Eldership of the Churches of God*, 396 U.S. at 369-70. Semantic wizardry performed in a search for secular meaning, transforming biblical reference to dictionary linguistics, constitutes judicial review forbidden by the Constitution.

Likewise, the Iowa Supreme Court's focus on publication of the church mailing in *Kliebenstein* to non-members on the church's mailing list is misguided. *Kliebenstein*, 663 N.W.2d at 406-07. The appropriate question must be whether the communication originated within the "realm of religious doctrine and polity," *O'Connor*, *supra*, at 368, and not whether it escaped the province of church membership. Publication only to church "membership" does not imbue the religious speech with any more religious character; and conversely, publication to non-members cannot transform religious speech into secular. The forbidden inquiry of a civil court into the truth or falsity of religious doctrine, disseminated within the realm of the church, is not abrogated by publication to a non-member.

At bottom, the mere fact that the Iowa Supreme Court sifted through lexicon to arrive at an appropriate secular definition of the "spirit of Satan" deviates from fundamental principles of church autonomy. But even more basic, the court's ultimate inquiry – focusing "not on the meaning of 'spirit of Satan' within an ecclesiastical context" but on "whether the phrase has a secular meaning" – is at odds with principles of defamation law mandating that "the publication must be considered as a whole, in the sense it would be understood by the readers to whom it was addressed." *Klayman v. Segal*, 783 A.2d 607, 614 (D.C. Cir. 2001) ("The concept of context 'requires that the court examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence.") (citing RESTATEMENT (SECOND) OF TORTS § 563: Defamatory Communications, cmt. e (1977)) ("words, whether written or spoken, are to be construed together with their context").

To take the phrase "spirit of Satan" out of its religious context and transform it into secular nothingness – rendering the speech subject to civil inquiry for truth or falsity – is to perform a work of legal fiction and create a dark precedent for the decline of church autonomy.

CONCLUSION

The tenets of church autonomy protect against civil inquest into religious concerns. The Iowa Supreme Court's decision in *Kliebenstein*, and the decisions of state courts exercising jurisdiction over religious defamation claims, violate First Amendment protection of the free exercise of religion embodied in decades of constitutional jurisprudence. The Southern Baptist Convention respectfully requests that the Court grant the petition for a writ of certiorari and repair the wall between church and state.

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